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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

BUFFINGTON LEVI ARTHUR,

Defendant and Appellant.

E034939

(Super.Ct.No. FSB031177)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Kenneth R. Barr, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Garrett Beaumont and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of rape of an unconscious person in violation of Penal Code section 261, subdivision (a)(4).<sup>1</sup> Thereafter, the trial court denied probation and sentenced defendant to the middle term of six years in state prison. On appeal, defendant contends (1) there was insufficient evidence to support the jury's verdict, and (2) the trial court abused its discretion in denying him probation. We reject these contentions and affirm the judgment.

## I

### FACTUAL BACKGROUND

On June 16, 2002, Valerie Richardson<sup>2</sup> invited the then 20-year-old Jane Doe to her mother's apartment in Colton. Valerie drove to Jane's apartment to pick her up with Valerie's brother Brent and sister Sherry, Sherry's daughter, and defendant. This was the first time Jane met Brent and defendant. Jane took her two-year-old son with her, and everyone rode together in Valerie's van. Along the way, Valerie stopped at a liquor store to buy some alcohol. Jane was dressed in a form-fitting, spandex-type "Fuba" outfit.

When they arrived at the apartment, Jane drank a coconut rum and orange juice beverage, sat on the living room couch with her son, and started watching videos while the others talked and played cards or dominoes. Jane had several drinks before she left her apartment but was sober. While Jane was on the couch, defendant approached her

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> Valerie declined to testify at trial, invoking her Fifth Amendment right against self-incrimination. Although the court ruled her prior testimony from the preliminary hearing was admissible, there is no indication in the record that Valerie's prior testimony was presented to the jury.

and asked her for her name again. She repeated her name; defendant reintroduced himself and then rejoined the others.

Jane continued to watch videos while she had one or two more of the rum drinks. She remained coherent, however. Valerie, Sherry, and Brent were also drinking. Defendant drank beer and Hennessy but was not drunk.

Sherry left the apartment before midnight, but before leaving, she gave defendant the key to her mother's bedroom and told him not to give the key to Valerie because she was known to steal things after everyone went to sleep. Sherry originally offered the key to Jane and her son so they would have a private place to sleep. Jane declined the offer and said she was fine on the couch. Brent went to bed while defendant and Valerie cooked some fish. Around midnight, Jane fell asleep on the couch with her son, while Valerie slept in her mother's bedroom.

Sometime later, Jane awoke to find defendant on top of her. Defendant was kneeling in front of the sofa with his chest on hers, trying to kiss her. Jane pushed him away. Defendant was wearing a T-shirt which covered his waist area; and his khaki pants and green boxer shorts were pulled down to his thighs. Jane asked defendant what he was doing. Defendant said he was wondering why her pants were down. Jane, who was still wearing her shirt, then lifted the blanket and saw that her pants had been pulled down, and there was a small amount of semen on her vagina and right inner thigh.

Jane was angry and upset. She pulled up her pants, went into the bedroom, and woke Valerie. Jane smeared the semen onto her palm, showed it to Valerie and told her what defendant had done. Jane then realized that she had left her son in the living room. When she went back into the living room to get him, defendant appeared to be asleep on

a different couch. Jane brought her son into the bedroom and stayed in there while Valerie went out.

Valerie went into the living room and asked defendant if he was “meddling” with Jane. Defendant said nothing happened and he did not know what Jane was talking about. He also told Valerie that he was asleep on the couch and that Jane must have been dreaming. Valerie then returned to the bedroom, locked the door, and called Sherry on a portable phone.<sup>3</sup> After Valerie and Jane told her what had occurred, Sherry said she would be there in 20 minutes. However, Sherry arrived about two hours later.

While waiting for Sherry, Jane fell back asleep in the bedroom. When Sherry arrived, Jane told her that defendant had raped her. Jane called the police. At the time Jane called the police, she did not realize that her vagina had been penetrated. She thought defendant had merely ejaculated on her while forcibly trying to kiss her. Sherry woke up defendant and asked him about Jane’s accusation. Defendant denied it and went back to sleep.

About 30 minutes later, at 6:53 a.m., Colton Police Officer Michael Farcas responded to the scene. He interviewed Jane and the others who were present. Sometime later, Colton Police Officer Henry Dominguez arrived at the scene. Officer Farcas did not opine that Jane was drunk and did not detect any odor of alcohol on her. Officer Farcas subsequently took Jane to Kaiser Hospital in Fontana for a sexual assault evaluation. Jane did nothing to give the impression that she wanted to have sex with defendant; she did not flirt, attempt to kiss him, or ask him to kiss her at anytime. She

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<sup>3</sup> At trial, Sherry testified that she returned to the apartment the next morning to take Jane to work and did not remember any telephone call.

did not agree to engage in intercourse or any other type of sexual activity with defendant. Jane had a boyfriend with whom she had sexual intercourse about a week prior to the incident.

Meanwhile, Officer Dominguez took custody of defendant and transported him to the police station, also for a sexual assault evaluation.<sup>4</sup> Defendant had no visible injuries; as part of the examination, a sample of defendant's blood was drawn.

Registered nurse Ann Rowney, who had 30 years of nursing experience, had previously performed over 2,500 sexual assault examinations, and had testified as an expert 22 times, performed an examination of Jane. Saliva and blood samples were collected from Jane for DNA testing. Nurse Rowney found two fresh tears between the labia inside Jane's vagina, which indicated that some type of blunt object had been inserted when Jane was not sexually aroused. The tears were less than 24 hours old, and there was an abrasive injury at the base of the vagina, which indicated there was penetration without Jane's assistance. No trauma was noted in the internal examination. Through the use of a saline wash, Nurse Rowney found "nonmotile" or nonswimming live sperm inside Jane's vagina. Generally, sperm becomes nonmotile in about six hours and can remain in the vagina up to two or three days. The sperm was preserved and submitted to the crime lab.

Nurse Rowney also noted a large amount of whitish discharge inside Jane's vagina due to a yeast infection. Jane had seen a doctor for treatment four or five days earlier, and the doctor had performed a pap smear. Nurse Rowney opined that the labial tears

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<sup>4</sup> The parties stipulated that defendant was wearing a pair of white cotton briefs at the time of the examination.

were not the result of any prior medical examination because a physician would move the labia out of the way prior to inserting a speculum into the vagina; she also testified that yeast was a fungus, and therefore it was different in appearance from sperm.<sup>5</sup> Nurse Rowney concluded that the vaginal injuries were consistent with the facts and circumstances described by Jane and that it was impossible for the injuries to have occurred a week earlier, when Jane last had sexual intercourse with her boyfriend.<sup>6</sup>

Blaine Kern, a criminalist with the San Bernardino County Sheriff's Department, analyzed defendant's blood sample as well as the immotive sperm collected by Nurse Rowney from Jane. He found that the DNA profiles of the sperm and blood matched and that defendant's DNA profile occurred in less than one in 770 trillion African-American males (approximately 10,000 times the current world population).

Defendant testified on his own behalf. He stated that after he and the others arrived at Valerie's mother's apartment, he made fish for everyone, played with Jane's son, and began becoming more acquainted with Jane. As the evening progressed, he began to find himself attracted to Jane, and around midnight, he and Jane talked for 35 to 40 minutes. Eventually, defendant and Jane, who did not appear drunk, began kissing and touching each other. Although Jane was an "active participant," defendant was a little bit more "aggressive" than she. Defendant assisted Jane in pulling her "tight" shorts

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<sup>5</sup> Jane testified that she did not have any vaginal tears prior to the incident with defendant.

<sup>6</sup> Nurse Rowney testified that during the examination, Jane was cooperative, calm, and composed and that such behavior was typical of many sexual assault victims she had seen, primarily because the examination usually occurs hours after the incident. In her experience, the more emotive and dramatic women had more questionable histories.

down to her thigh. He then unbuttoned his pants and lay between Jane's spread legs. His penis rubbed against her thigh; however, he did not have an erection. He testified he had a "secretion" problem with his uncircumcised penis, and there was discharge whenever he engaged in sexual conduct.

Defendant further testified that Jane remained awake as they continued to talk, kiss and rub each other. At one point, Jane said someone was coming, told defendant to "[g]et off," and gently pushed him away. He pulled up his pants and went to the other couch. Both of them then fell asleep. Approximately 90 minutes later, when he awoke, he noticed Jane asleep on the other sofa. He then went over to her, knelt next to her, and tried to resume their lovemaking by playing with her braids and running them around her face in an attempt to wake her up. Jane woke up angry, which surprised defendant. Jane said something and walked away; he then went back to sleep. Defendant claimed that he did not engage in any sexual intercourse with Jane.

Defendant also explained that around 6:00 a.m. he awoke when Sherry returned to the apartment and knocked on the front door. He claimed that Valerie never confronted him about anything; when Sherry asked him if he had done something to Jane, he denied doing anything. Sherry told defendant that the police had been called; however, defendant remained in the apartment and went back to sleep because he had done nothing wrong. When the police arrived, he willingly spoke with Officer Farcas, he did not resist, and he willingly went to the police station where he was examined and told to remove his clothing.

Defendant denied ejaculating that evening or having intercourse with Jane. He also denied Jane was asleep as the romance transpired between the two of them and

claimed that had Jane not heard someone stirring, they would have engaged in sexual intercourse. He further denied Sherry gave him a key to her mother's bedroom.

Officer Farcas interviewed defendant twice. The first time, they spoke briefly in the living room. Defendant told Officer Farcas that he went to sleep at around 2:00 a.m. and did not mention having sex with anyone. After his arrest, defendant informed Officer Farcas that he laid down next to Jane after Valerie went into the bedroom and that he then began massaging Jane's stomach and breasts. Defendant admitted having sexual intercourse with Jane but claimed it was consensual. He also told Officer Farcas that he pulled his penis out of Jane's vagina before ejaculating and that he was not sure if Jane was awake while he was penetrating her.

## II

### DISCUSSION

#### A. *Insufficiency of the Evidence*

Defendant contends there was insufficient evidence to support his conviction for rape of an unconscious person because the evidence supporting the conviction was "inherently improbable." We disagree.

Our review of any claim of insufficiency of the evidence is limited. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26



Cal.3d 557, 578; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331 and *People v. Parra* (1999) 70 Cal.App.4th 222, 225.)

Given this court's limited role on appeal, defendant bears an enormous burden in claiming there was insufficient evidence to sustain his conviction for rape of an unconscious person. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*Jackson v. Virginia* (1979) 443 U. S. 307, 319, 326; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 361; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1447; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) The standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Section 261, subdivision (a)(4) provides that sexual intercourse with another person constitutes rape "[w]here a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: [¶] (A) Was unconscious or asleep. [¶] (B) Was not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact."<sup>7</sup>

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<sup>7</sup> Although not relevant here, we note that in 2002 the Legislature added subpart (D) to section 261, subdivision (a)(4), which provides: "Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

Rape is a general intent crime and merely requires intent to do the prohibited act. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 34.) The mental state requirement for rape of an unconscious person is only that the perpetrator knows the victim is unconscious and has the intent to have sexual intercourse with that person. “Hence, a person who intentionally has sexual intercourse with an unconscious victim knowing that the victim is unconscious commits rape of an unconscious person.” (*Ibid.*) As the appellate court in *Dancy* recognized, rape of an unconscious person does not include a consent element. (*Id.* at p. 35.) Thus “sexual intercourse with an unconscious person is a criminal sexual offense regardless of real or hypothetical consent.” (*Ibid.*)

In the present matter, viewing the evidence in the light most favorable to the People and drawing all reasonable inferences in favor of the judgment, there was ample direct and circumstantial evidence to support defendant’s conviction. Jane testified that she drank alcohol prior to being picked up, and that she continued to drink at the apartment. In addition, by the time Jane fell asleep it was approximately midnight. Jane testified that she was asleep at the time of the rape and awoke after defendant had ejaculated. Jane’s testimony was not contradicted by any witness other than defendant himself. Furthermore, independent medical findings provided persuasive evidence that defendant had sexual intercourse with Jane when she was not sexually aroused or assisting the penetration. Nurse Rowney, a well-qualified expert, opined that the medical findings were consistent with Jane’s description of the incident. Moreover, defendant admitted to Officer Farcas that Jane might have been asleep when he penetrated her.

Defendant argues that “it seems inherently improbable the events [Jane] related to the jury could have occurred without her knowledge and participation,” given the fact

that she was dressed in a “‘very tight,’ ‘form-fitting’” spandex outfit, and the abrasive injuries to her vagina as a result of the penetration. However, we may only reject statements given by witnesses who have been believed by the jury when there is a physical impossibility that they are true. The testimony “must be inherently improbable and such inherent improbability must plainly appear.” (*People v. Ozone* (1972) 27 Cal.App.3d 905, 910, disapproved on other grounds in *People v. Gainer* (1977) 19 Cal.3d 835, 847- 851.) We remind defendant that inconsistencies and suspicions cannot serve as a basis for overturning the jury’s credibility determination -- only inherent improbability and obvious falsehood can. (*People v. Thornton* (1974) 11 Cal.3d 738, 754.) We find nothing inherently improbable in Jane’s testimony here. Jane had been drinking alcohol earlier on the day of the incident; she continued to drink more alcohol when she arrived at Valerie’s mother’s apartment; and she eventually fell asleep on the couch around midnight. The fact that Jane did not awake while defendant removed Jane’s tight, form-fitting spandex shorts and when she received tears to her vagina as a result of the penetration raised a credibility issue for the jury to resolve, but it did not make her testimony improbable or impossible. Defendant’s arguments to the contrary were credibility issues for the jury to resolve. (*People v. Lewis, supra*, 26 Cal.4th 334, 361; *People v. Hill* (1998) 17 Cal.4th 800, 848-849, *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139; *People v. Franz, supra*, 88 Cal.App.4th 1426, 1447; *People v. Hale, supra*, 75 Cal.App.4th 94, 105.)

Therefore, viewing the evidence as we must in a light most favorable to the judgment, we believe any reasonable trier of fact could have found defendant guilty of rape of an unconscious person under these facts.

B. *Denial of Probation*

Defendant next asserts that the trial court abused its discretion in denying him probation. We again disagree.

The decision to grant or deny probation rests within the broad discretion of the trial court, and that decision will not be disturbed on appeal “*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316, italics omitted; see also *People v. Edwards* (1976) 18 Cal.3d 796, 807; *In re Cortez* (1971) 6 Cal.3d 78, 85-86.) A defendant bears a heavy burden when attempting to show an abuse of that discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) To exercise the power of judicial discretion, all of the circumstances of the offense and defendant’s participation therein must be considered. (*People v. Strunk* (1995) 31 Cal.App.4th 265, 275.) In the present matter, the trial court properly considered all of the factors and evidence in denying defendant probation.

“Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. (§§ 1191.1, 1202.7.) A defendant’s eligibility for probation is determined, by deductive reasoning, from statutes identifying the types of offenses or offenders who are ineligible to receive it. It is absolutely unavailable as a sentencing choice in many serious felony cases and presumptively unavailable in others unless ‘unusual’ circumstances are present and the ‘interests of justice’ are best served thereby. [Citations.]” (*People v. Welch* (1993) 5 Cal.4th 228, 233.)

California Rules of Court, rule 4.414<sup>8</sup> sets forth the factors to be considered in determining whether to grant or deny probation. When it denied probation, the trial court relied on a statement in aggravation by the prosecutor; a statement in mitigation by defense counsel; and the probation report, which concluded there were six factors supporting a denial of probation: the victim was vulnerable (rule 4.414(a)(3)); defendant inflicted physical or emotional injury (rule 4.414(a)(4)); defendant was an active participant in the commission of the crime (rule 4.414(a)(6)); the manner in which the crime was carried out demonstrated criminal sophistication and/or professionalism on the part of the defendant (rule 4.414(a)(8)); defendant had a prior criminal record which indicated a pattern of regular or increasingly serious criminal conduct (rule 4.414(b)(1)); and defendant was not remorseful (rule 4.414(b)(7)). The factor supporting a grant of probation was that defendant's prior performance on probation was satisfactory and he was not on a grant of probation at the time he committed the present offense (rule 4.414(b)(2)).

In denying probation, the sentencing court relied on defendant inflicting physical and emotional injury to the victim (rule 4.414(a)(4)); defendant's active participation in the crime (rule 4.414(a)(6)); that the manner in which the crime was carried out demonstrated criminal sophistication and/or professionalism on the part of defendant (rule 4.414(a)(8)); the victim's vulnerability (rule 4.414(a)(3)); and defendant's lack of remorse (rule 4.414(b)(7)). The court also took into consideration the general sentencing objectives as set out in rule 4.410 and the primary considerations in granting probation as set out in section 1202.7, which included protecting society, punishment, deterrence,

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<sup>8</sup> All future rule references are to the California Rules of Court.

crime prevention, restitution, uniformity in sentencing, and reintegration of defendant into society. Based on the above factors, the court found that “there would not be a likelihood the defendant would succeed upon a grant of probation” and therefore denied probation.

There is no evidence the trial court did not give due consideration to the factors supporting or denying a grant of probation. Absent evidence to the contrary, the court is presumed to have acted to achieve legitimate sentencing objectives. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378.)

Defendant, however, maintains that the trial court abused its discretion because it incorrectly relied on rule 4.414(a)(4) as physical and/or emotional injury is inherent in the crime itself. We cannot agree. As the People point out, section 261, subdivision (a)(4) does not require *any* injury.

Conceding the factor that he was an active participant in the crime (rule 4.414(a)(6)), defendant next asserts the record does not support the court’s finding that the crime demonstrated criminal sophistication and planning or that he would not succeed on a grant of probation. We reject defendant’s contentions for several reasons. First, the record is contrary to defendant’s self-serving assertions. The record does show that the manner in which the crime was carried out demonstrated criminal sophistication, professionalism, or planning on the part of defendant (rule 4.414(a)(8)). As the court explained, defendant had the key to the back bedroom and was told by Sherry to not give the key to Valerie, but defendant gave the key to Valerie anyway so that he could be alone with Jane, making Jane more vulnerable. This evidence shows that defendant

essentially planned the incident, especially in light of the fact that he testified that as the evening progressed, he began to find himself attracted to Jane.

Second, there were two additional factors, which defendant does not dispute, that weighed against a grant of probation. The evidence clearly showed that the victim was vulnerable (rule 4.414(a)(3)) and that defendant lacked remorse ((rule 4.414(b)(7)). The victim was 20 years old at the time, while defendant was 43, and the victim was unconscious when defendant committed the offense. Further, defendant continued to deny any wrongdoing in this matter even when confronted with the DNA evidence. This very lack of remorse and refusal to acknowledge wrongdoing are significant in assessing whether the defendant will continue to engage in criminal conduct. Lack of remorse is properly utilized as a reason for denying probation. (*People v. Leung* (1992) 5 Cal.App.4th 482, 507-508; *People v. Fowler* (1980) 109 Cal.App.3d 557, 565-567, overruled on another ground in *People v. Humphrey* (1982) 138 Cal.App.3d 881, 882.) The court may consider “the nature and circumstances of the defendant’s offense, the defendant’s appreciation of and attitude toward the offense, and his traits of character as evidenced by his behavior and demeanor at the trial.” (*Fowler*, at p. 566.) Moreover, the general objectives of sentencing, which include protecting society (rule 4.410(a)), punishing defendant (rule 4.410(b)), and encouraging defendant to lead a law-abiding life in the future and deterring him from future offenses (rule 4.410(c)), also supported a denial of probation.

Defendant lists various factors he claims favored a grant of probation. However, “the trial court need not articulate its reasons for rejecting factors which would support

the grant of probation. [Citations.]” (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 366.)

The trial court’s decision to deny defendant probation based on the factors under rule 4.414 was within the bounds of reason and judicial discretion. “The decision to grant or deny probation requires consideration of all the facts and circumstances of the case.” (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185.) The denial of probation was based on the court’s rational assessment of all appropriate factors, and it reflects an intent to achieve legitimate sentencing objectives. Defendant has failed to demonstrate that the trial court exercised its discretion in denying probation in an arbitrary, capricious, or unreasonable manner.

### III

#### DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

HOLLENHORST  
Acting P.J.

KING  
J.